United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1513

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74 - 1513

STEVEN F. BROWN,

Appellant,

-against-

MAJOR GENERAL WILLIAM KNOWLTON, Superintendent, United States Military Academy, BRIGADIER GENERAL SAMUEL WALKER, Commandant, United States Military Academy, and ROBERT F. FROEHLKE, Secretary of the Army,

Appellees.

KUNSTLER KUNSTLER HYMAN & GOLDBERG
Joan Goldberg, Esq.,
of Counsel
Attorneys for Appellant
370 Lexington Avenue
New York, New York 10017

PAUL J. CURRAN, ESQ.
United States Attorney
Southern District of New York
Christopher Roosevelt, Esq.,
of Counsel
United States Court House
Foley Square
New York, New York 10007

I N D E X

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

STEVEN F. BROWN,

Appellant,

Docket No. 74-1513

-against-

MAJOR GENERAL WILLIAM KNOWLTON, Superintendent, United States Military Academy, and ROBERT F. FROEHLKE, Secretary of the Army,

Appellees.

----------x

This is an appeal from an order of the District Court for the Southern District of New York, Ward, J., granting defendants' motion for summary judgment, upholding the propriety of appellant's dismissal from the United States Military Academy and discharge from the United States Army. Appellant argued that his dismissal did not comply with due process requirements of the Fourteenth Amendment.

The Facts

In June 1972, appellant completed four years at the United States Military Academy and should have graduated.

However, in March 1972, appellant had an automobile accident off post while he was confined as a result of a demerit award.* As a result of the accident appellant was brought before a Commandant's Board which resulted in a determination that he repeat his fourth year. After this decision appellant was subjected to another Board for an alleged serious conduct violation. Subsequently, an Academic Board hearing attempted to eliminate him based on his failure to pass English.** Then an Academic Board proceeding was convened based on his receipt of excessive demerits. This Board recommended Brown's dismissal and was the subject of this action.

Between March and May 1972, appellant, who had never received substantial demerits in any year, accumulated over 125 demerits.

During this period he was also subjected to four Boards, all seeking to eliminate him while attending classes, taking examinations and attempting to comply with the rigorous standards of the Academy.

---

* Brown was punished for drinking at a reception. First classmen are normally permitted to drink and the demerits were canceled after Brown contested them at the second Academic Board hearing.

** §5.18 of the Regulations gives a cadet who is deficient in a single course the right to a re-examination.

On June 21, 1972, he was dismissed from the Academy and discharged from the Army pursuant to a recommendation by the Academic Board that he be separated because he had accumulated excessive demerits for the period from January 1972 through June 1972.*

Appellant instituted an action in the District Court asserting that the procedure for awarding demerits and separating him for poor conduct denied him due process, in that:

(a) He was not present at the hearing;

(b) He did not have an opportunity to call witnesses or otherwise present testimony in his own behalf;

(c) He had no opportunity to cross-examine the persons who initiated charges against him;

(d) He had no opportunity to consult with counsel;

(e) He was not permitted to examine his records on file;

(f) No basis was set forth for the decision;

(g) He had no right to file a brief;

---

* If a cadet is found to be deficient because he accumulated excess demerits, then the Board must decide whether he has the potential to remain at West Point.

(h) There is no appeal procedure from an adverse decision;

(i) Many of the charges were initiated by appellant's Tactical Officer and the award of demerits was made by the same officer.

The District Court, Judge Frankel, sitting in the emergency part, granted a preliminary injunction ordering appellant's reinstatement at the Academy in August, 1972, and further stated that no limitations be placed on such reinstatement without application to the court. He repeated the entire year without incident - receiving a minimum number of demerits and passing all his courses. Nevertheless, he was not graduated with his class.*

Subsequent to the decision of the Court of Appeals in Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972), the appellees created a new procedure for separating cadets from the Academy where they had accumulated excessive demerits. Under this procedure, appellant had another hearing based on the same charges that resulted in his earlier dismissal.**

---

* Query whether the failure to graduate appellant without specific application to the court violated Judge Frankel's order. (A-107).

** Hagopian and Jaremko were found to have been wrongfully awarded excessive demerits and were permitted to graduate with their class.

Although the Academic Board determined that 40 demerits were improperly awarded to Brown, he nevertheless remained with 16 over the maximum and his separation was recommended. Appellant was not graduated and the Government moved to dismiss the complaint as moot. The motion to dismiss was granted and appellant was permitted to file a supplementary complaint. Both parties moved for summary judgment and the court decided in favor of appellees.

Questions Presented

1. Whether the procedures followed by the United States Military Academy to dismiss appellant without commission and without a degree was a violation of the due process clause requiring reversal

   a. where adequate notice of charges was not given;

   b. where the hearing took place beyond the relatively short period of one semester which would permit cadet to remember facts and circumstances of charges;

   c. where there was no opportunity to cross-examine the officers who awarded demerits;

   d. where cadet is presumed to be guilty of all charges against him;

   e. where the only evidence submitted by appellees was the hearsay record of award of demerits.

2. Whether failure to include recommendation from the Commandant was a violation of due process requiring reversal.

3. Whether the excessive demerits were awarded discriminatorily in an attempt to dismiss appellant after

three prior attempts failed.

4. Whether in a proceeding to determine aptitude for retention due process is violated if the cadet is not permitted to see his file to rebut unfavorable reports and/or correct inaccurate reports.

Argument

The Court below erred because it failed to recognize that defendants did not follow the Hagopian decision. Although adopting the language in that case the Court ignored the failure of the Academic Board to comply with the decision. Point I sets forth the inadequacies of the second Academic Board hearing.

A comparison with the intitial hearing points up the problems with the second. The first hearing was based on the cadet's written submission, hearsay submissions from others and the view of the Board on the question of potential. Such a hearing was not a fair hearing because the cadet was not apprised of the charges against him and permitted a defense, and he was not given an adequate opportunity to present his defense. (346 F. Supp. at p. 33)

The second Academic Board also accepted the submission of the Delinquency Reports to prove that the cadet committed the violation. In lieu of a written

submission questioning or rebutting the charges, appellant was permitted to appear in person. However, he was not permitted to cross-examine the charging officer, nor was his sworn testimony deemed sufficient to rebut the charges.

These hearsay reports were admitted for the truth of the charges set forth therein and if permitted as an exception to the hearsay rule, as declared by Judge Ward, are not admissible without at least a foundation being laid. Normally the courts require proof that the record was made in the ordinary course of business and that it was within the business to make such report. Litigation material has not been considered the normal course of business, but notwithstanding the inappropriateness of using these records, it is clear that some of the reports have been retyped and therefore were not made at the time of the occurrence.

Those Delinquency Reports which merely set forth a conclusory statement that the cadet committed a breach of discipline, for example, his room was not in PMI order, without setting forth the facts of the violation, can hardly be deemed sufficient to provide notice of the charge because the factual basis for the charge is not set forth. Conviction on those charges is not based on substantial evidence.

Appellees argued that there was a presumption of regularity as to the correctness of Government records.

However, the Academic Board removed 40 of the 158 demerits accumulated by the appellant. Thus the presumption of regularity was destroyed and the weight to be given the remaining awards should have been found insufficient to sustain the finding of the Board.

The factual basis for upholding the validity of the second hearing is destroyed by comparison with the original hearing on demerits. It is further weakened by the failure of both parties to preserve records.

However the Academic Board hearing took place and in the instant case the Board made a finding that Brown exceeded his demerit allowance and was then called upon to consider the question of retention, a very subjective determination without any standards for making such decisions. Nevertheless, it is clear from the Academy Regulations that the recommendation of the Commandant is essential to making a decision regarding aptitude for retention. Yet, nowhere in the official records does it indicate that such recommendation was made. Unlike Donham v. Resor, 436 F.2d 751 (2d Cir. 1970), where the recommendation of the Tactical Officer was not included with Donham's application for discharge as a conscientious objector, which is merely one recommendation in a series of recommendation, the Regulation provides

that aptitude for retention shall be based primarily on the Commandant's recommendation and was totally ignored.

This failure to comply with the regulation requires reversal.

POINT ONE

THE PROCEDURE UTILIZED TO DISMISS APPELLANT FROM THE UNITED STATES MILITARY ACADEMY VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW

The dismissal of appellant from the United States Military Academy immediately prior to his scheduled graduation date deprived him of due process of law and violated fundamental notions of fairness. This Court has held, in Wasson v. Trowbridge, 382 F.2d 807 (1967), and Hagopian v. Knowlton, 470 F.2d 201 (1972), that a service-academy cadet may not be dismissed without according him due process of law. While this Court, in balancing the unique needs of the military and the weighty considerations due the rights of individuals, has held that due process at an Academy separation hearing need not consist of the same protection as those afforded to a welfare recipient, it is clear that the Military Academy must afford the cadet a "fair hearing". As this Court stated in Wasson, and again in Hagopian, a "fair hearing" presumes, at least, a hearing at which the cadet

> "...is apprised of the charges against him and permitted a defense... He must be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence..." 382 F.2d 812; 470 F.2d 210.

The protection of the individual cadet's rights, intended by the procedures set out in Hagopian, were denied to appellant herein. The second hearing before the Academic Board, which resulted in the recommendation that appellant be dismissed from the Academy while in form modeled after the Hagopian decision, in substance denied appellant the rights Hagopian sought to guarantee, in that:

1. The hearing was not timely, and appellant was not fully apprised of the specific charges against him;

2. Appellant was denied a hearing before an impartial tribunal;

3. Appellant was presumed to be guilty of all the charges against him; and

4. The Academic Board sustained demerit awards with no basis in fact.

A. The hearing was not timely and, thus, appellant was denied a meaningful opportunity to prepare his defense.

In Hagopian, this Court made clear that a hearing at which a cadet is given an opportunity to challenge the validity of demerits previously awarded to him for improper conduct must be timely in order to insure that the hearing is not a futile exercise. Because demerits are frequently

awarded for very petty and minor infractions of conduct, this Court held that a timely hearing was one held within the "relatively short duration of the college semester." A hearing held beyond that time period would be a meaningless gesture since the recollection or memory of minor events is likely to fade and witnesses may disappear.

Notwithstanding the timeliness rule of Hagopian, appellant herein was not given a fair hearing before the Academic Board until December, 1972, some nine months after many of the demerits in question were awarded. Appellant informed the Board that due to the passage of time he was unable to recollect the events surrounding the demerit awards in question, (A-132) and thus was unable to meaningfully respond to those charges against him. He requested that the Board furnish him with a bill of particulars as to each charge so he might respond, which request was denied.

It is no answer to the failure of respondents to provide appellant with a timely hearing to say, as the Court below did, that appellant was not prejudiced since there had been a "hearing" during the prescribed period and appellant should or could have preserved his recollection since the matter was in litigation. It is clear that

appellant's first Academic Board hearing in no way comported with due process; appellant was neither present, nor properly apprised of the charges against him, nor given an opportunity to make any meaningful challenge to the awarded demerits through the presentation of witnesses or other evidence in his own behalf. Thus, although timely, the first hearing did not provide appellant with an opportunity to become aware of (and thus remember) all the facts underlying minor demerit awards since at that time the charges lacked specificity and no underlying facts were ever developed by the Board. Where, as here, a hearing is so lacking in due process protections, that hearing cannot properly be binding on appellant in any fashion.

In addition, the failure of respondents to meet the requirement that the separation hearing be timely, i.e., that it be conducted within the demerit period in which excessive demerits were accumulated, further deprived appellant of a fair hearing under Wasson and Hagopian in that it made fair apprisal of the charges against appellant impossible.*

---

* It should be noted that the Academy waited some five months to convene a new Academic Board to consider separation of appellant after the District Court entered an injunction against appellant's separation without a fair hearing in August, 1972.

A number of demerits awarded to appellant were for minor infractions which, at the time of the award, were not contested by appellant as he was not then in jeopardy.* (A-96) However, at the time of appellant's hearing, the details of these demerit awards, not having been recorded, were unknown both to appellant and the Board. Clearly, appellant could not possibly defend against charges the substance of which was unknown to him. The requirement that appellant be fairly apprised of the charges against him is so fundamental that it was clear error for the Board to sustain these awarded demerits, 32 in number, the facts of which had long been forgotten and could not be reconstructed either by appellant or the Board.**

B. The hearing provided to appellant was not procedurally the fair hearing intended or described in Hagopian v. Knowlton

At the time of the hearing under consideration herein, appellant had been the subject of numerous Academy proceedings questioning his aptitude for retention at the Academy and in the United States Army. As more fully set

---

* This failure to contest a demerit when awarded was specifically found to be the customary practice among cadets who were not near their maximum demerit allowance in Hagopian.

** Neither the Academy nor the Cadet has reason to believe that a hearing would be granted on the individual demerits until that procedure was contested by Hagopian, Brown and another.

forth in the statement of facts, supra, appellant had been a successful cadet in his first 3 1/2 years at the Academy with no serious academic or conduct problems. It was only as a result of a car accident, when appellant was outside the Academy without authorization, that appellant's difficulties began and "snowballed".* At the time of the accident, midway through the term, appellant had accrued only 30 demerits of a permissible maximum of 102. Then, within eight weeks, appellant was awarded an incredible 122 demerits for primarily minor offenses (see A-192-3) and was brought before four Commandants Boards (A-194-7). In addition, in that same period, the last eight weeks of what would have been appellant's final school year, appellant was brought up before both an Officers Board and an Aptitude Board to determine if he should be separated or retained. (A-39,42.) In addition, he was reported to the Academic Board for deficiencies in academics, aptitude and conduct.

It thus appears that even before the first and improper hearing of the Academic Board relative to appellant's alleged deficiencies in conduct, various attempts were made

---

* Note also that the demerits for the infraction for which Brown was restricted were removed by the Second Board.

to dismiss appellant from the Academy in the middle of his fourth year. It was only after the successful defense of these attempts to remove appellant that the matter was brought to the Academic Board in the posture of appellant's accrual of excessive demerits.*

While neither the second Academic Board, the Secretary of the Army, nor the District Court spoke to this particular aspect of appellant's situation, it seems apparent that appellant was the victim of discrimination and harassment. He was awarded an excessive number of demerits for minor infractions of regulations not ordinarily enforced against all other cadets with the zeal that they were enforced against appellant in an attempt to provide grounds for his separation when other means to effect his dismissal failed.

In this posture, in view of the very short period in which appellant was awarded an extraordinary number of demerits,**the Academic Board hearing became less an informal

---

* It should be noted that in his repeated final year appellant's conduct was uneventful. At no time did he have any difficulties or receive excess demerits.

** Experience also tells us that it is extremely unlikely that one would remember the facts and circumstances of each demerit award when they are accumulated in a short period of time.

inquiry to determine if appellant had accrued valid, excess demerits and if he should be retained, and more like an adversary proceeding designed to separate appellant from the Academy.* Thus, the standards and guidelines of a "fair hearing" set forth in Hagopian were, in fact, insufficient to protect Brown's rights. Unlike Cadet Hagopian, appellant herein was in the near impossible position of not merely having to challenge the facts of demerits awarded, but of also having to challenge the motive behind the awards, the good faith of his Tactical Officer-Commander, and the possibility of selective enforcement of certain regulations, in order to avoid separation. Clearly,this placed a greater burden on appellant who, though he might have remembered the facts of some of the infractions, was not trained or qualified to make the sophisticated investigation, objections and questioning that were necessary in his peculiar situation.

Because of the prior history of various Academy attempts to dismiss appellant, the procedural rights accorded him did not provide even the minimal due process protections that this Court in Hagopian intended a cadet such as Brown

---

* It should be noted here that the Board did call its own witnesses at the hearing to testify against appellant both on the demerit issue and on the retention phase (see Board Summary,(A145-6),thus bringing to the hearing an adversarial quality.

to have. Without being given an opportunity to see and rebut statements contained in his file, to voir dire the the Academic Board members about their knowledge of and feelings towards his case, and to have the assistance of someone trained to raise the legal questions and objections inherent in this final attempt to dismiss him, appellant was deprived of the "fair hearing" required by Hagopian and due process of law.

The unique facts and circumstances of appellant's situation were such that it was incumbent upon the court below to hold a de novo evidentiary hearing to determine if appellant was in fact granted a fair hearing comporting with the standards of due process enunciated by this Court in Hagopian, supra, or had instead been given a hearing which on its face appeared to be fair but in the circumstances deprived appellant of due process of law. Clearly, since it is within the province of the court to determine if a cadet has been granted due process of law in his separation hearing, the court has the power to hold such a de novo hearing on that question. Krawez v. Stans, 306 F.Supp. 1230 (1969); Wasson v. Trowbridge, supra, on remand,285 F.Supp.936, Memorandum and Order of John F. Dooling, Jr., D.J., dated May 7, 1968.

In the instant case, appellant's disciplinary record, on its face, illustrates that a concerted effort was

made by the Academy to separate appellant however possible. He was harassed with excessive demerit awards, Commandants Boards, Officers Board, Aptitude Board and Academic Board, all within an eight-week period in his final year at the Academy.

In addition, the final Academic Board which recommended appellant's separation had not only previously sat in judgment against him, but also had complete access to his Academy records and file reflecting appellant's history of having appeared before various other separation boards.* In view of the Board members' complete familiarity with appellant and with the other attempts made by the Academy to separate him, it cannot be said that the Academic Board was not biased against appellant.

Thus, in view of the clear requirement that appellant was entitled to a fair hearing before an impartial Board on the validity of his accumulated demerits and on the issue of his potential for retention at the Academy, the peculiar circumstances of appellant's case made a de novo hearing by the court below essential to a determination of whether or not appellant did indeed

---

* It should be noted that the Board also had access to evaluations of appellant and other material which appellant himself was not permitted to see and rebut. (A-) This failure to allow appellant to examine his own evaluations and to rebut any adverse or incorrect information contained in them denies appellant a meaningful opportunity to argue in support of his own retention at the Academy. Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971). It also denies him the opportunity to correct any inaccurate material that may be in his file.

receive a fair hearing.

C. The presumption of regularity accorded to the demerit awards by the Board denied appellant due process of law.

The presumption of regularity accorded by the Board to Brown's demerit awards was erroneous and a denial of due process for the reason that, as an official record, Brown's Delinquency Record may only be presumed correct if prepared in accordance with regulations by the appropriate officer. This was not done in this case. Brown's delinquency record was prepared and signed by his Company Tactical Officer (A-193). However, Academy regulations, Disciplinary System Standing Operating Procedures, ¶21C, annexed hereto, provides that this duty shall be performed by the Regimental S-1 Officer. Thus, not only did the Tactical Officer's preparation and execution of the Delinquency Record violate the Academy's own regulations, but it also violated due process in that at the time that the Tactical Officer made 77% of the demerit awards in question, Brown was no longer in his company under his command, but, rather, was transferred to the direct control of the Regimental S-1 Officer. (A-156). Thus, the majority of Brown's demerits were awarded by an improper officer whose control appellant was not under.

In addition, it is clear that by according to appellant's demerit awards a presumption of regularity, the

Board imposed the burden of proof on appellant to disprove the validity of each and every demerit he received. To place this burden upon the cadet is unfair and a denial of due process of law. In view of the specific finding in Hagopian that cadets customarily do not challenge demerit awards at the time they receive them unless they are approaching their maximum demerit allowance, it is both unrealistic and improper to say that these demerits will be presumed to be valid merely because the cadet accepted them without challenge.* Clearly,this custom of the cadets illustrates that demerit awards may not, without a further showing, be presumed to be factually correct.

It is an undue burden to require the cadet to come forward and disprove the validity of demerit awards without requiring the Academy to establish a prima facie case of their validity based on objective evidence rather

---

* To accord such a presumption to these demerit awards, with the accompanying effect that the cadet must later disprove their validity, ignores the realities of the Academy disciplinary system which is considered to be "correctional and educational in nature rather than being legalistic and punitive." See, Hagopian, supra, at page 205. It seems clear that if a cadet is aware that at some future time he may be required to disprove the validity of demerits received upon penalty of being separated, each demerit received would be contested by the permitted cadet explanation procedures and the correctional, non-legalistic spirit of the Academy disciplinary procedures would be defeated.

than a mere presumption of regularity. As this Court noted in Hagopian, the individual award of demerits is not a terribly serious intrusion, but when there is an accumulation of demerits subjecting a cadet to the very serious penalty of separation from the Academy, the cadet's rights must be fairly protected. Where, as here, the severe penalty of separation is in issue, even the most minimal standards of due process require that appellant not bear the burden of proving his innocence. The presumption of innocence must be accorded greater weight than a presumption of regularity of "official records" and the Academy must bear the burden of establishing prima facie that appellant's demerits were validly awarded on the basis of reliable objective evidence showing the truth of the facts underlying the particular offenses.*

---

* In this connection it should be noted that Army Regulation 635-100, ¶4-32a, dealing with the procedures of the board of inquiry charged with recommending for or against the retention of any officer, a situation analogous to appellant's, places the burden on the Government to establish by a preponderance of the evidence that the officer is unfit for retention.

D. The Academic Board sustained demerit awards which were completely unsupported in the record.

The first functioning of the Academic Board convened to consider appellant's separation from the Academy was to determine if appellant had accumulated an excessive number of validly awarded demerits. Only when such accumulation was found could the Board proceed to consider whether or not appellant had potential warranting retention. Clearly, while the latter question of retention involves discretion and expertise by the Board, the former question of the validity of the demerits involves no discretion but is merely a factual issue.

Since there is no element of discretionary action in the Board's role as determiner of the validity of the demerits awarded, the conclusions of the Board are subject to judicial review to determine if they are supported by the record. Hammond v. Lenfest, 398 F.2d 705 (2d Cir., 1968).* Such review is foreclosed only where the military necessarily must exercise its discretion and such discretion was not abused. Orloff v. Willoughby, 345 U.S. 83 (1953); cf. U.S. ex rel Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir.,1968).

It is clear that if appellant was to receive a fair hearing before the Academic Board, due process requires that the Board may not properly declare demerit awards to be valid unless supported by substantial evidence. The Board nevertheless upheld awards which were unsupported by any evidence and as to which appellant gave sworn

---

* It should be noted that the decision of all Army Boards are required to be supported by substantial evidence under AR 15-6.

uncontroverted testimony establishing defenses. The Board may not act arbitrarily or on the basis of suspicion or speculation but must make a determination that has some basis in fact in the record.

In the instant case, the Board erred in sustaining at least 60 demerits that had been awarded to appellant notwithstanding the fact that appellant's sworn, uncontroverted testimony or other evidence before the Board established that there was no basis for these awards:

1. 2 demerits: improper wearing of belt. uncontradicted testimony was that appellant wore belt as did all other cadets (A-100);

2. 3 demerits; sleeping atop the bed; uncontradicted testimony was that appellant was not asleep but merely resting and slept between the sheets that night (A-100);

3. 45 demerits; failure to comply with general orders; Commandant's Boards: Evidence before the Board established that this award was approved in violation of Academy Regulation Disciplinary System S.O.P., ¶ 32(n) by the Deputy Commandant rather than the Commandant and thus void since the reuglation makes this duty non-delegable (A-105).

There was clearly no basis in fact in the record for sustaining these demerit awards. Apparently, in upholding the validity of certain of the awards, the Board

relied on the fact that appellant had not contested these demerits at the time they were awarded. As noted above, in the sub-point C, cadets are required to sign for demerit awards when received but, as this Court found in Hagopian, customarily do not challenge awards early in the demerit period. Thus, it was error for the Board to rely on appellant's signature on the awards as constituting an admission of guilt on the underlying facts. The mere fact that appellant signed his demerit awards, as required by Academy regulations, does not constitute a basis in fact for sustaining those awards in the face of uncontroverted evidence establishing their invalidity.

POINT TWO

THE ACADEMIC BOARD ACTED ARBITRARILY, CAPRICIOUSLY AND FAILED TO FOLLOW ACADEMY REGULATIONS IN DETERMINING APPELLANT'S POTENTI FOR RETENTION

The function of the Academic Board, as this Court found in Hagopian v. Knowlton, supra, is, after determining if excess demerits have been validly awarded, to recommend that the cadet be retained or separated from the Academy. In order to fulfill its responsibility for making such a recommendation, the Academy has promulgated regulations to insure that the decision to retain or separate a cadet will not be made arbitrarily.

The Dean's Standing Operating Procedures, Item XXIV, Disposition of Deficient Cadets, provides, in relevant parts, as follows:

> "A. Definitions
>
> 1. Deficient Cadet: A cadet who has failed to meet the minimum standards of performance in a course, in conduct, or in aptitude for the service. Determination of deficiency will be made by the Department Head concerned subject to the approval of the Academic Board.
>
> * * *
>
> C. Disposition of deficient cadets will be made in accordance with the guidelines and procedures below:
>
> 1. The desirability of retaining a deficient cadet will be based on the evaluation of his overall potential, both academic and military. Academic potential will be determined by cumulative QPA (Quality Point Average). Military potential will be determined primarily by the evaluation of the Commandant."

Thus, the Academy's own regulations make it clear that after the Academic Board had found appellant deficient in conduct, the Board was to recommend separation or retention, and such recommendation was to be determined by considering appellant's academic standing and an evaluation of his military potential by the Commandant. The regulations thus prohibit the Board from making a determination as to retention without considering not only the academic standing of appellant but also an evaluation of appellant by the Commandant.

Notwithstanding the mandatory language of XXIV, C(1), the Academic Board in the instant case failed to comply with its requirements. Although testimony was taken at the Board hearing from witnesses produced by appellant and by the Board on the question of retention, at no time was the required evaluation of appellant's military potential by the Commandant made.

The failure of the Commandant to evaluate appellant's potential as required by Academy regulations must make their recommendation that appellant be separated a nullity. Where regulations have been validly promulgated, the failure to follow those regulations is error and a denial of due process of law. Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

The determination of the Board recommending that appellant be dismissed from the Academy, in addition to being in violation of the regulations, was arbitrary and an abuse of the Board's discretionary power in that it denied to appellant not only the opportunity to be commissioned as a United States Army officer but also the right to receive the Bachelor of Science degree to which he was entitled. It is settled law that although the courts are reluctant to inject themselves into the day-to-day operations of the military, where there is an abuse by the military of its discretionary powers, judicial review and relief are available. Hammond v.

Lenfest, supra. Assuming, arguendo, that the Board's decision to recommend appellant's separation had been properly made and made in conformity with Academy regulations, it is clear that that decision, insofar as it constitutes a decision that appellant is not deserving of a commission as an army officer, will not be reviewable by this Court under the rule of Orloff v. Willoughby, supra. However, a different rule obtains insofar as that decision denies appellant a Bachelor of Science degree which he has earned by his successful completion of every academic requirement for that degree. The refusal to give appellant the degree to which he is entitled constitutes an abuse of discretion and is reviewable.

The reluctance of the courts to interfere in military operations is based, of course, in considerations of national defense, military exigencies and separation of powers. There is, however, no reason for such reluctance where the military acts in a non-military capacity, as here, where the question is the grant or denial of a Bachelor of Science degree.*

---

* It should be noted that pursuant to Academy regulations appellant is given credit on his transcript for all courses successfully completed. Thus the Academy has awarded him credit but withholds the equivalent degree.

Appellant has, in toto, spent five years at the United States Military Academy and has successfully completed every academic requirement, having only his conduct and aptitude to serve as an officer questioned in the last eight weeks of his final year. Even if it is ultimately determined that appellant's separation is proper, he should not be denied the academic collegiate degree which he has earned. No military exigency requires appellant not receive a Bachelor of Science degree, and the civilian necessity for a college degree is clear.* In view of the fact that appellant has spent five years at the Academy, during which time he performed satisfactorily with the exception of the eight-week period in his fourth year which resulted in this litigation, it would appear that, even if appellant's discharge from the Academy and Army is upheld, the loss of his commission opportunity is sufficient penalty for any conduct deficiency, and the loss of his Bachelor of Science degree would be excessive.

---

* Appellant cannot merely transfer his earned credits as could a cadet separated any time prior to completion of his final year. To obtain his degree from any other university, appellant would have to be in attendance for at least one year in addition to the five years he has spent at the Academy in pursuit of a degree and commission.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court be reversed, or in the alternative, modified to require respondent-appellees to award appellant a Bachelor of Science degree.

June 18, 1974

Respectfully submitted,

KUNSTLER KUNSTLER HYMAN & GOLDBERG
Attorneys for Appellant

Joan Goldberg, Esq.,
Of counsel

2 Copies Received

Date June 19 1974

Firm U.S. Attorney

By _____

(2)

COPY RECEIVED

Paul J Curran

UNITED STATES ATTORNEY

6/19/74